

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

THOMAS DRAWDY, individually  
and on behalf of all others  
similarly situated,

Plaintiff,

v.

NATIONWIDE INSURANCE COMPANY  
OF AMERICA,

Defendant.

No. 2:22-cv-00271-JAM-KJN

**ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS**

I. BACKGROUND

This action concerns the adequacy of the premium refund Nationwide Insurance Company of America ("Defendant" or "Nationwide") provided to California auto policyholders during the COVID-19 pandemic. See Compl., ECF No. 1. Thomas Drawdy ("Plaintiff"), one such policyholder, purchased Nationwide insurance for both his personal automobile and a recreational vehicle before the start of the pandemic and its associated government shutdown and stay-at-home orders. Id. ¶ 13. Due to the pandemic, Plaintiff "barely drove" either of his vehicles in 2020. Id. ¶ 15.

Nationwide provided its insureds, including Plaintiff, with a one-time refund of \$50. Id. ¶ 16. Plaintiff received his \$50 refund on May 7, 2020. Id. Plaintiff asserts this refund was "not sufficient to compensate him for the overpayment of premiums

1 due to the associated decrease in driving and risks stemming from  
2 the COVID-19 pandemic.” Id. ¶ 17. In support of this assertion,  
3 he cites to various bulletins issued by the California Insurance  
4 Commissioner regarding premium refunds during the pandemic. Id.  
5 ¶¶ 20-25.

6 Plaintiff brings a single claim for violation of the  
7 California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code  
8 § 17200 *et seq.*, on behalf of a class of California residents who  
9 purchased personal automobile, motorcycle, or RV insurance from  
10 Nationwide covering March 1, 2020, through March 1, 2021. Id. at  
11 9-11. He claims Defendant’s “retention of, and failure to  
12 refund, premiums” is “unfair because it allowed Nationwide to  
13 retain refunds that are not based on an accurate assessment of  
14 risks, and was an unfair and unreasonable application of approved  
15 rates.” Id. ¶ 39.

16 Defendant moves to dismiss the complaint under Federal Rules  
17 of Civil Procedure 12(b)(1) and 12(b)(6). See Mot., ECF No. 8.<sup>1</sup>  
18 Plaintiff opposed the motion. See Opp’n, ECF No. 11. Defendant  
19 replied, see Reply, ECF No. 12, and filed a notice of  
20 supplemental authority, see Not., ECF No. 15.

## 21 II. OPINION

### 22 A. Request for Judicial Notice

23 Defendant requests the Court take judicial notice of seven  
24 exhibits: (1) the CDI Bulletin 2020-3 issued April 13, 2020;  
25 (2) the Nationwide Refund Letter to Thomas Drawdy; (3) the CDI  
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27 <sup>1</sup> This motion was determined to be suitable for decision without  
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled  
for July 12, 2022.

1 Amended Bulletin 2020-8 issued December 3, 2020; (4) the  
2 February 1, 2021 Nationwide Insurance Company of America COVID-  
3 19 CA reporting form; (5) the CDI Bulletin 2021-03 issued on  
4 March 11, 2021; (6) the CDI 2020 CA Property & Casualty Market  
5 Share Report for Private Passenger Auto by Group Written  
6 Premium; and (7) the March 16, 2022 Order in Rose v. GEICO  
7 Casualty Co., Case No. 3:21-cv-00385-DPJ-FKB, 2022 WL 1438551  
8 (S.D. Miss. Mar. 16, 2022). Def.'s Req. for Judicial Notice  
9 ("RJN"), ECF No. 8-2. Plaintiff does not object to the request  
10 as to Exhibits 1, 3, 5, and 7, but does object as to Exhibits 2,  
11 4, and 6. Opp'n at 13-14. After careful consideration of the  
12 parties' arguments, applicable caselaw, and the documents  
13 themselves, the Court finds Exhibits 1, 3, 4, 5, 6, and 7 to be  
14 proper subjects of judicial notice and thus grants Defendant's  
15 request as to those documents. See Lee v. City of Los Angeles,  
16 250 F.3d 668, 689-690 (9th Cir. 2001). However, the Court takes  
17 judicial notice only of the existence of these documents and  
18 declines to take judicial notice of their substance, including  
19 any disputed or irrelevant facts within them. Id. at 690.

20 With respect to Exhibit 2, Plaintiff argues it is a non-  
21 public document with no evidence in the record confirming if it  
22 was sent, when it was sent, whether Plaintiff received it, or  
23 any other authenticating evidence. Opp'n at 13. Defendant  
24 counters that this exhibit is a proper subject of judicial  
25 notice because it is based on Plaintiff's own allegations that  
26 (1) Nationwide provided a refund for March and April 2020, and  
27 that (2) he received a refund from Defendant on May 7, 2020.  
28 Reply at 2-3 (citing to Parrino v. FHP, Inc., 146 F.3d 699, 706

1 (9th Cir. 1998)). However, Defendant fails to explain why  
2 judicial notice is necessary when the Court already has  
3 Plaintiff's allegations regarding Nationwide's refund before it.  
4 See Compl. ¶ 16. Indeed, Defendant states the Court "can" take  
5 judicial notice, not that it "must." Reply at 3 n.2.

6 The Court declines to take notice of this non-public  
7 document which is unnecessary to the determination of this  
8 motion. Defendant's request is denied as to Exhibit 2.

9 Plaintiff asks the Court to take judicial notice of the  
10 Insurance Commissioner's Brief filed in Rejoice!. Pl.'s RJN,  
11 ECF No. 11-1. As this is a matter of public record and  
12 therefore a proper subject of judicial notice, the Court grants  
13 Plaintiff's request. See Lee, 250 F.3d at 690. Again, however,  
14 the Court takes notice only of the existence of this document,  
15 not of any disputed or irrelevant facts within. Id.

16 B. 12(b)(1) Motion

17 A defendant may move to dismiss for lack of subject matter  
18 jurisdiction pursuant to Federal Rule of Civil Procedure  
19 12(b)(1). Fed. R. Civ. P. 12(b)(1). Faced with a Rule 12(b)(1)  
20 motion, plaintiff bears the burden of proving the existence of  
21 the court's subject matter jurisdiction. Thompson v. McCombe,  
22 99 F.3d 352, 353 (9th Cir. 1996).

23 Here, Defendant raises two arguments for dismissal under  
24 Rule 12(b)(1). Mot. at 10-14. First, Defendant contends  
25 Plaintiff's claim falls within the Insurance Commissioner's  
26 exclusive jurisdiction over the setting of insurance rates. Id.  
27 at 10-13. However, as Plaintiff points out, three California  
28 district courts have rejected that argument and distinguished

1 the same California caselaw cited by Nationwide here. Opp'n at  
2 2-6 (citing to Day v. GEICO Casualty Company, Case No. 21-cv-  
3 02103-BLF, 2022 WL 179687 (N.D. Cal. Jan. 20, 2022); Rejoice!  
4 Coffee Co., LLC v. Hartford Fin. Serv. Group, Inc., Case No. 20-  
5 cv-06789-EMC, 2021 WL 5879118 (N.D. Cal. Dec. 9, 2021); and  
6 Boobuli's LLC v. State Farm Fire & Casualty Co., 562 F.Supp.3d  
7 469 (N.D. Cal. 2021)). The California Insurance Commissioner  
8 has also rejected Defendant's position. Id. at 6-7. In spite  
9 of this unanimous weight of authority against its position,  
10 Defendant asks the Court to find otherwise that these Northern  
11 District cases were "wrongly decided." Mot. at 12. Defendant  
12 directs the Court to four out-of-circuit decisions from  
13 Mississippi, Missouri, New York, and Nevada. Id. at 11  
14 (collecting cases). But the Court agrees with Plaintiff that  
15 these decisions interpreting other state's insurance codes have  
16 no bearing on the present analysis of Plaintiff's UCL claim  
17 which is governed by California insurance law. Opp'n at 5-6.  
18 Moreover, the Court agrees with the detailed exclusive  
19 jurisdiction analysis in Day, Rejoice!, and Boobuli's. See 2022  
20 WL 179687, at \*3-5; 2021 WL 5879118, at \*3-7; 562 F.Supp.3d at  
21 477-484 ("In sum, State Farm's exclusive jurisdiction argument  
22 fails because [plaintiff] is not seeking to challenge the rate  
23 itself, but the misapplication of the rate in light of changed  
24 circumstances given the COVID-19 pandemic."). This Court too  
25 finds that Plaintiff's challenge is to the application of  
26 approved rates, not to the rates themselves, and therefore does  
27 not fall within the Insurance Commissioner's exclusive  
28 jurisdiction. Defendant's argument for dismissal on exclusive

1 jurisdiction grounds thus fails.

2       However, Defendant's second argument - that the Court  
3 should dismiss this case under the primary jurisdiction doctrine  
4 - has merit. Mot. at 13-14; Reply at 5. "The primary  
5 jurisdiction doctrine allows courts to stay proceedings or to  
6 dismiss a complaint without prejudice pending the resolution of  
7 an issue within the special competence of an administrative  
8 agency." Clark v. Time Warner Cable, 523 F.3d 1110, 1114 (9th  
9 Cir. 2008); see also Syntek Semiconductor Co., Ltd. v. Microchip  
10 Tech. Inc., 307 F.3d 775, 781 (9th Cir. 2002) ("[T]he doctrine  
11 of primary jurisdiction is committed to the sound discretion of  
12 the court when 'protection of the integrity of a regulatory  
13 scheme dictates preliminary resort to the agency which  
14 administers the scheme.'"") Courts consider whether application  
15 of the doctrine "will enhance court decision-making and  
16 efficiency by allowing the court to take advantage of  
17 administrative expertise" and "whether application will help  
18 assure uniform application of regulatory laws." Chabner v.  
19 United of Omaha Life Ins. Co., 225 F.3d 1042, 1051 (9th Cir.  
20 2000).

21       As an initial matter, Plaintiff does not dispute the Court  
22 has the authority to dismiss this action pursuant to the primary  
23 jurisdiction doctrine. See Opp'n at 7-8. Rather the dispute is  
24 over whether the Court should apply the doctrine. Id.; see also  
25 Reply at 5. Defendant argues it should because it would be more  
26 appropriate for the Insurance Commissioner, who has the relevant  
27 technical expertise, to consider Plaintiff's claim. Reply at 5.  
28 The Court agrees. Further, Plaintiff had the opportunity in

1 opposition to explain why the Court, as opposed to the  
2 Commissioner, should consider Plaintiff's claim yet failed to do  
3 so. See Opp'n at 7-8. Plaintiff generally contends the primary  
4 jurisdiction doctrine "does not require that all claims within  
5 an agency's purview be decided by the agency" nor "is it  
6 intended to secure expert advice for the courts from regulatory  
7 agencies every time a court is presented with an issue  
8 conceivably within the agency's ambit." Cohen v. ConAgra  
9 Brands, Inc., 16 F.4th 1283, 1291 (9th Cir. 2021) (internal  
10 citation and quotation marks omitted). This may be so, but  
11 Plaintiff does not explain why application of the doctrine here  
12 would not "enhance court decision-making and efficiency by  
13 allowing the court to take advantage of administrative  
14 expertise." Chabner, 225 F.3d at 1051.

15 Accordingly, the Court applies the primary jurisdiction  
16 doctrine and grants Defendant's motion to dismiss without  
17 prejudice. See Clark, 523 F.3d at 1114. Because the Court  
18 dismisses under the primary jurisdiction doctrine, the Court  
19 does not reach the parties' additional 12(b)(6) arguments. See  
20 Mot. at 6-10; see also Opp'n at 9-13.

21 III. ORDER

22 For the reasons set forth above, the Court GRANTS  
23 Defendant's motion to dismiss.

24 IT IS SO ORDERED.

25 Dated: July 28, 2022

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27   
28 JOHN A. MENDEZ  
SENIOR UNITED STATES DISTRICT JUDGE